

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

**COMMENTS OF THE  
MONTANA PUBLIC SERVICE COMMISSION**

**I. Overview**

The Montana Public Service Commission (MPSC) submits these comments in response to the Federal Communications Commission's (Commission) inquiry regarding the establishment of sustainable new unbundling rules pursuant to 47 U.S.C. Sections 251(c) and 251(d)(2) of the Communications Act of 1934, as amended.

The MPSC's comments include: a review of the proceeding that occurred in Montana in response to the Commission's Triennial Review Order (TRO); the batch hot cut process in Montana; and the recent decision of the MPSC regarding carrier's obligations to file negotiated agreements pursuant to 47 U.S.C. §252.

The MPSC attaches to these comments two documents from the Montana Commission's TRO proceeding. The MPSC also files with these comments the MPSC's Order finding an agreement between Qwest and Covad to be a negotiated interconnection agreement subject to review and approval pursuant to 47 U.S.C. §252. No proprietary documents are filed and the MPSC does not seek a waiver of the standard filing requirements.

## **II. Comments**

### **A. Review of the MPSC's TRO proceeding**

In anticipation of the Commission's Triennial Review Order (TRO) the MPSC issued a Notice of Opportunity to Intervene and to participate in the MPSC's implementation of the Commission's TRO.<sup>1</sup> Qwest Communications (Qwest), OneEighty Communications, WorldCom, Inc. (MCI), AT&T and the Montana Consumer Counsel (MCC) intervened in the proceeding. After the Commission's issuance of the TRO on August 21, 2003 the MPSC issued a procedural schedule in which Qwest was required to frame the scope of the docket by identifying the findings of impairment in the TRO that Qwest intended to challenge.<sup>2</sup>

Qwest submitted a Statement of Scope on October 15, 2003, and a Resubmitted Statement of Scope on October 22, 2003. In its Resubmitted Statement of Scope, Qwest indicated it would only challenge the Commission's finding that competitive local exchange carriers (CLECs) are impaired without access to unbundled switching for mass market customers. AT&T and MCI filed responses to Qwest's framing of the proceeding, in which AT&T and MCI generally argued that Qwest was obligated at the outset to narrow the geographic scope of the proceeding and to identify which particular markets in Montana it intended to challenge the impairment finding. Qwest's position was generally that it could not limit the geographic market in which it intended to make its case prior to receiving critical facts from competitors (many of which were non-parties to the docket) through discovery. Subpoenas were issued to several non-party competitors on Qwest's behalf.

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<sup>1</sup> Notice of Opportunity to Intervene, D2003.5.62, Service date May 19, 2003.

<sup>2</sup> PSC Docket No. D2003.5.62, Order No. 6516, footnote 2, Service date October 17, 2003.

Before the MPSC took action on the dispute regarding the scope of the docket, Qwest filed a “Motion to Postpone the Mass Market Switching Case and Close the Docket.”<sup>3</sup> In its Motion, Qwest argued that the docket should be closed because, among other reasons, Qwest “cannot verify unequivocally that the three switch trigger is met in Montana.”<sup>4</sup> No objections to the Motion were received, and the MPSC entered an Order closing the Docket on January 23, 2004.<sup>5</sup>

No conclusions regarding the Commission’s impairment finding were reached in Montana. However, based on Qwest’s withdrawal of its challenge to the impairment finding and Qwest’s representation that it could not unequivocally state that the three switch trigger could be met, the MPSC finds there has been no showing that CLECs are not impaired without access to Qwest’s switches to serve mass market customers.

In addition, Qwest chose not to challenge the FCC’s impairment finding with respect to dedicated transport and local loops in Montana, and Qwest only challenged in the first instance the Commission’s finding that CLECs are impaired without access to unbundled switching for mass market customers.

Based on Qwest’s decision not to challenge the presumption of impairment set forth in the TRO with respect to dedicated transport and local loops, the MPSC finds that no challenge was made in Montana to the presumption of impairment set forth in the TRO with respect to dedicated transport elements (DS1, DS3, and dark fiber) and local loops.

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<sup>3</sup> Motion to Postpone Mass Market Switching Case and Close Docket, filed December 11, 2004, attached to these comments as MPSC Comments Exhibit A.

<sup>4</sup> Motion to Postpone, Exhibit A, page 2, paragraph (a).

<sup>5</sup> Order Closing Docket, PSC Docket No. D2003.5.62, Order No. 6516b, attached to these comments as MPSC Comments Exhibit B.

**B. Batch Hot Cut Process**

As part of the implementation of the FCC's TRO, the parties in MPSC Docket No. D2003.5.62 submitted a joint proposal for the process and framework to be used to address the batch hot cut requirements.<sup>6</sup> The parties agreed that using a multi-state forum with participation by staff and industry for all states within the Qwest region was the most efficient mechanism to reach agreement on a batch hot cut process to be submitted to the state commission for review. The MPSC approved the joint proposal and the MPSC agreed to participate in the development of a batch hot cut process through a region wide forum.<sup>7</sup>

As states in the Qwest region postponed or terminated TRO proceedings in the spring of 2004, the multi-state forum ended and no proposal to develop a consensus proposal for an efficient batch hot cut process to reduce per-line hot cut costs was submitted to the MPSC. The MPSC concludes that, as the Commission indicated in the TRO, without an efficient and affordable hot-cut process in place, and in the absence of unbundled switching, CLECs using self-deployed switches will face operational and economic barriers to competitive entry.

**C. The MPSC's Order regarding 252 filing requirements**

On May 19, 2004 Qwest and DIECA Communications, Inc., d/b/a Covad Communications (Covad) filed a Commercial Line Sharing Agreement with the Commission, stating in a cover letter that the filing was being made for "informational purposes only. After issuing a Show Cause Order requesting comments as to why the agreement should not be treated as a negotiated interconnection agreement subject to the

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<sup>6</sup> Joint proposal submitted by AT&T, Qwest and Worldcom MCI, submitted to the Commission on October 31, 2003 in MPSC Docket No. D2003.5.62.

<sup>7</sup> Notice of Commission Action issued November 19, 2003 in MPSC Docket No. D2004.5.62.

filing requirements of 47 U.S.C. §252, and considering comments received in response to the Show Cause Order, the Commission entered an Order finding that the agreement between Qwest and Covad is a negotiated interconnection agreement subject to the filing requirements of 47 U.S.C. §252.<sup>8</sup>

Qwest has subsequently filed three additional agreements with the MPSC for “informational purposes” only. One of those filings is an agreement between Qwest and MCI, and while Qwest filed the agreement for informational purposes only, MCI filed the agreement with the MPSC pursuant to 47 U.S.C. §252(a), for the MPSC’s review and approval. Qwest moved to dismiss MCI’s filing. The MPSC has not yet acted on Qwest’s motion to dismiss MCI’s filing and the remaining filings submitted for “informational purposes” only.

In its Order finding that the Covad agreement was a negotiated interconnection agreement subject to the filing requirements of 27 U.S.C. §252, the MPSC addressed the limited number of carriers purchasing UNE-P in Montana. Specifically, the MPSC found that “[s]ince the decision of the D.C. Circuit Court of Appeals was issued in USTA II, two of the eleven CLECs offering UNE-P in Montana have withdrawn or stopped marketing their services in Montana.”<sup>9</sup> (Footnote in original Order.)

The MPSC concludes that interconnection agreements entered into to fulfill a carrier’s obligations under 47 U.S.C. §251 must be filed with the state commission for review and approval, and thereby made available to other competing carriers in that

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<sup>8</sup> MPSC Order No. 6572a in Docket No. D2004.6.89, attached to these comments as MPSC Exhibit C.

<sup>9</sup> As of 1/31/04, Qwest informed the Commission that the CLECs purchasing UNE-P in Montana were Three Rivers, Excel Telecommunications; Ionex; MCI Metro; McLeod; New Access; NOS Communications; One Eighty (Avista); OptiCom; Vartec; and Z-Tel. Since March of 2004, Z-Tel informed the Commission it would no longer be offering service in Montana, and MCI has ceased marketing its services in Montana.

market pursuant to 47 U.S.C. §252(i). Once a carrier has agreed to make network elements that pertain to §251 available to a competitor through an interconnection agreement the agreement must be filed with the state commission for review and approval. The presence or absence of a network element on the FCC's list of required UNEs at any given point in time should not control the filing requirement of 47 U.S.C. §252. Rather, an agreement must be filed under §252 if it is related to any of the obligations the carrier has under §251(b) and (c) to make its network available to competitors.

Using the FCC's list of elements that must be made available, established pursuant to 47 U.S.C. §251(d), as determinative of what agreements must be filed under §252 will not provide market certitude. Rather, the MPSC finds that requiring negotiated agreements that pertain to a carrier's obligations under §251 to be filed, without reference to the current FCC list of required UNEs, will provide certitude to carriers negotiating such agreements with their competitors.

Finally, the MPSC concludes that state commissions should determine in the first instance whether agreements must be filed under §252. The MPSC agrees with the FCC's conclusion in its Declaratory Ruling in *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, released October 4, 2002 on this issue. The MPSC also agrees with the FCC that the filing requirement of §252 is the first and strongest protection under the Act against discrimination by an incumbent against its competitors, and concludes that the

state commission is in the best position to determine which agreements must be filed for review and approval to prevent such discrimination in any given market.

### **III. Conclusion**

The MPSC concludes that in developing rules as to which network elements must be made available to competitors under 47 U.S.C. §251(d), the FCC should require dedicated transport elements (DS1, DS3, and dark fiber), mass market switching and local loops be made available to competitors in markets where the incumbent did not challenge at the state level the FCC's findings presuming CLEC impairment without access to those elements.

Regarding the batch hot cut process, the MPSC concludes that without an efficient and affordable hot-cut process in place, and in the absence of unbundled switching, CLECs using self-deployed switches face operational and economic barriers to competitive entry.

The MPSC further concludes that agreements negotiated by a carrier to fulfill its obligations under 47 U.S.C. §251(b) and (c) must be filed with state commissions for review and approval, and that state commissions should determine in the first instance whether an agreement must be filed under 47 U.S.C. §252.

Respectfully submitted this 4<sup>th</sup> day of October, 2004,

THE MONTANA PUBLIC SERVICE COMMISSION